BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of Qwest Communications International, Inc. Petition for Declaratory Ruling On the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements Under Section 252(a)(1)	))))))))))	WC Docket No. 02-89

COMMENTS OF THE MINNESOTA DEPARTMENT OF COMMERCE IN OPPOSITION TO QWEST'S PETITION FOR DECLARATORY RULING

MINNESOTA DEPARTMENT
OF COMMERCE

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The Minnesota Department of Commerce respectfully submits these comments in opposition to Qwest Communications International Inc.'s ("Qwest's") Petition for a Declaratory Ruling with respect to §252(a)(1) of the Telecommunications Act (the "Petition").

I. INTRODUCTION

There is no need for the FCC to issue the ruling sought by Qwest in its Petition. Sections 251, 252 and 271 of the Telecommunications Act (the "Act") set forth the standards for an interconnection agreement ("ICA") and have provided unequivocal guidance for the filing of thousands of ICAs without the need for further Commission review. Moreover, the Act and the Commission's decisions interpreting it are clear: all interconnection agreements must be filed for approval by the relevant state commission under 47 U.S.C. § 252(a)(1) and 47 U.S.C. § 252(e).

Qwest's Petition seeks to modify and narrow these clear and unambiguous standards to achieve Qwest's self-serving goals of avoiding regulatory scrutiny. The underlying motivation behind Qwest's bringing this Petition lies not in Qwest's need for guidance, but rather in its attempt to forestall further investigation into its practice of entering into secret agreements with CLECs in order to further Qwest's regulatory agenda.

As described in these comments, the Department has been conducting an investigation into Qwest's practice of entering into unfiled agreements with CLECs that define terms and conditions of interconnection and access to unbundled network elements ("UNEs"). Eleven such agreements (the "Secret Agreements") form the basis of a complaint filed on February 14, 2002, by the Department against Qwest before the Minnesota Public Utilities Commission ("MPUC").

This is not, as Qwest portrays it, a case of business-as-usual, where Qwest honestly made mistakes and reasonable minds can disagree. To the contrary, the evidence discovered by the Department establishes that Qwest entered into these agreements, in part, to manipulate the regulatory process relating to Qwest's Section 271 application and the Qwest / U S WEST merger. Qwest, for example, secretly agreed to provide two CLECs with significant discounts on all of their purchases from Qwest (including collocation, UNE and tariffed purchases), as part of a group of interdependent agreements that required the CLECs not to participate in the state or federal review of Qwest's Section 271 application.[1] It kept these agreements and others secret both to prevent state commissions from discovering this manipulation and to avoid having to offer other CLECs the same, beneficial terms that it traded for favorable regulatory treatment.

There is no ambiguity regarding the type of agreements that must be filed under 47 U.S.C. §252. The standards are set by 47 U.S.C. §§ 251(b) and (c), 252(a)(1) and 271(c)(2)(B). To the extent that the question of whether the terms of any specific agreement make it an interconnection agreement subject to Section 252 is questionable or a close call, that determination should be made by state commissions, not the FCC.

As the Commission will see from these comments, however, the 11 secret agreements cited by the Department do not raise close or questionable calls. They contain provisions that make them undeniably interconnection agreements under the Act. Qwest's failure to file these agreements resulted not from any good faith mistake, but rather its desire (a) to prevent state and federal regulators from seeing how Qwest was attempting to manipulate the regulatory process,

[1] Additional evidence found by the Department, including documents signed by senior executives at Qwest, shows that these agreements were part of a broader course of conduct by Qwest designed to prevent state and federal regulators from obtaining direct evidence that Qwest is not meeting its Section 271 obligations.

and (b) to prevent non-party CLECs from obtaining the same benefits that inured to the party CLECs.[2]

In these comments, the Department will describe for the Commission the ongoing Minnesota proceeding, its genesis, and the documents and other evidence found by the Department that give context to Qwest's conduct and its Petition. The Department will also address the legal standards that define interconnection agreements and the filing requirements under Section 252. Following that, the Department will address several of the specific arguments made in Qwest's Petition and show that, despite Qwest's professed concern, there really is nothing that need be done by the Commission regarding this issue.

In the end, the Department believes the Commission will find no basis for granting Qwest's Petition.

II. THE DEPARTMENT'S COMPLAINT IN MINNESOTA IS BASED ON EXISTING LAW AND ADDRESSES NARROW ISSUES OF KNOWING AND INTENTIONAL VIOLATIONS OF THE ACT BY QWEST.

The Department's complaint against Qwest in Minnesota is based on a narrow set of agreements and does not attempt to categorize every agreement between Qwest and a CLEC as an interconnection agreement that must be filed under the Act. To the contrary, Qwest initially provided the Department with only a small sampling of what it said were numerous Ancillary Services Agreements and/or bill credits. The Department did not request to see the remainder of these "classes" of documents, nor did it seek to require their filing and approval. After much negotiation, however, Qwest finally produced for the Department between 70 and 80 confidential

[2] Some of the evidence collected by the Department has been identified as trade secret by the party producing it. All such evidence, and the discussions of its content, have been marked trade secret in these comments and is being treated under the Commission's rules regarding confidential information.

agreements of a more substantive nature entered into by Qwest and various CLECs. Of that limited number, the Department identified in its complaint only 11 that should have been filed under the Act.[3] Those agreements addressed pricing and other terms and conditions by which Qwest agreed to provide access to interconnection, unbundled network elements and services on a forward-looking basis.

A. The Agreements Identified By The Department Contained Terms And Conditions Of Interconnection And Access To UNES.

Each provision from the 11 agreements that should have been filed with the Minnesota Public Utilities Commission ("MPUC") is identified in specific detail in the complaint, which is attached for the Commission's information as Appendix A to these comments. The agreements from which those provisions come are attached as exhibits to the complaint and are therefore also available for the Commission to review as part of Appendix A. The provisions cover a wide range of terms and conditions for interconnection and access to UNEs and services including the following:

(1) A 10% discount on all aggregate purchases – including purchases of UNEs, collocation and tarriffed services – made by Eschelon Telecom, Inc. ("Eschelon") from Qwest between November 15, 2000 and December 31, 2005. (Complaint, ¶¶ 92 – 109 and Exhibit 4.)

(2) An agreement to provide Echelon with the best reciprocal compensation rates available to any CLEC in any of the 14 states in Qwest's ILEC territory (as

[3] The Department has recently received new evidence indicating that there are one or more additional agreements that (a) were not previously produced by Qwest to the Department and (b) should have been filed with the MPUC but were not. Although the Department's investigation into these matters is continuing, some of the details about these new agreements are highlighted later in these comments.

opposed to simply the best available rate in Minnesota). (Complaint, ¶¶ 30 – 39 and Exhibit 1.)

(3) An agreement as to the methodology for calculating the switching usage fees for a UNE platform product offered by Qwest to Eschelon. (Complaint, ¶¶ 127 – 130, 147 - 151 and Exhibit 6.)

(4) An agreement to provide a dedicated, on-site team of Qwest employees to help Eschelon get UNEs ordered from and provisioned by Qwest. (Complaint, ¶¶ 30 – 35, 44 – 49, 58 - 71 and Exhibits 1 and 2.)

(5) An agreement to provision certain types of UNE loops to Covad Communications Company ("Covad") within a set number of days. (Complaint, ¶¶ 160 – 165, 180 - 182 and Exhibit 7.)

(6) An agreement to provide firm order confirmations ("FOCs") to Covad within a specified time frame, and to change the FOC process for certain types of UNE loops. (Complaint, ¶¶ 160 – 179 and Exhibit 7.)

(7) An agreement to perform line conditioning on UNE loops purchased by Covad within specified time frames. On the date Qwest entered into the agreement with Covad, loop conditioning was performed on an individual case basis for every other CLEC. (Complaint, ¶¶ 160 – 165, 187 – 195 and Exhibit 7.)

(8) An agreement to refund Eschelon $13 (later increased to $16) per line per month for certain UNE platform lines purchased by Eschelon from Qwest in lieu of providing accurate access information for use by Eschelon in billing IXCs for access. (Complaint, ¶¶ 92 – 98, 110 – 114, 115 – 122 and Exhibits 4 and 5.)

(9) An agreement to make specified central offices available to USLink, Inc. and InfoTel Communications, LLC for use as local tandems. (Complaint, ¶¶ 239 – 251 and Exhibit 11.)

(10) An agreement to change the dispute resolution terms of Eschelon's interconnection agreement with Qwest to provide Eschelon with alternatives not available to other CLECs. (Complaint, ¶¶ 30 – 35, 50 – 57 and Exhibit 1.)

(11) Agreements to make senior-level executives available to both McLeodUSA and Eschelon to address issues arising regarding the interconnection relationships between those companies and Qwest. (Complaint, ¶¶ 72 – 91, 219 – 238 and Exhibits 3 and 10.)

Each of these provisions created a concrete and specific legal obligation in Qwest to do something or refrain from doing something related to both Qwest's obligations under 47 U.S.C. § 251(b) and (c) and its obligations under 47 U.S.C. § 271(c)(2). In addition, each provision addressed issues that are regularly the subject of Qwest's interconnection agreements and/or its 47 U.S.C. § 252(f) statement of generally available terms. Despite that, none of the agreements containing these provisions were filed with the MPUC as required by 47 U.S.C. § 252(a)(1) and 47 U.S.C. § 252(e).

Qwest's suggestion that the Department seeks to make every agreement between Qwest and a CLEC subject to the filing requirements of the Act is opprobrious. As previously noted, the Department's complaint only identifies 11 out of more than 70 confidential agreements produced by Qwest to the Department as part of its investigation, which were a fractional subset of the total agreements entered into by Qwest. Included in the thousands of agreements not raised in the complaint are settlement agreements of what appear to be legitimate billing disputes; purchase agreements that do no more than set purchase commitments between the parties (i.e. they do not set pricing terms for UNEs, collocation, etc.); day-to-day operational agreements that implement specific provisions of interconnection agreements (e.g. collocation agreements, applications for access to poles, ducts, conduits and rights of way, etc.); and other agreements that have nothing to do with Qwest's obligations under the Act.

B. QWEST Knew That The Agreements Should Have Been Filed With State Commissions.

The claim throughout Qwest's Petition that its failure to file the Secret Agreements was a good faith mistake based on a lack of regulatory clarity is belied by Qwest's conduct and evidence found by the Department during its investigation.

The agreement to give Eschelon a 10% discount on every purchase made by Eschelon from Qwest, for example, was hidden in a sham "consulting" arrangement described in paragraph 3 of the agreement identified in the Department's complaint as Eschelon Agreement IV. The fact that the consulting arrangement was a sham intended to evade regulatory scrutiny is evidenced by **[BEGIN TRADE SECRET]** [4]

[4] **[BEGIN TRADE SECRET]** **[END TRADE SECRET]**

[END TRADE SECRET]

The real intent behind the 10% volume discount is also evidenced by the fact that Qwest simultaneously entered into an agreement to provide a comparable volume discount to **[BEGIN TRADE SECRET]** **[END TRADE SECRET]** as described in more detail below in Section III.B of these comments. In both cases, **[BEGIN TRADE SECRET]** **[END TRADE SECRET]**

The fact that the consulting agreement was a sham is also evidenced by the agreement itself, which ties Eschelon's "compensation" only to the amount of its purchases from Qwest. In other words, the payment had no rational relationship to the amount or value of the "consulting" services actually performed by Eschelon. In fact, the agreement provides that if Eschelon did not meet the purchase commitment set out in Appendix C, then every penny of the discount would go back to Qwest regardless of how much work Eschelon actually did for Qwest. Likewise, if Eschelon purchased more than the $150 million purchase agreement amount, it would still get 10% off of the excess purchases. So, for example, if Eschelon purchased $500 million of "products" from Qwest during the term of the agreement, then Eschelon would receive a $50 million refund under the agreement <u>even if it did absolutely nothing else for Qwest under the agreement</u>.

In addition, the Department and its consultants have reviewed all of the documents produced by Eschelon and Qwest during the Department's investigation, including all of the documents in Qwest's possession demonstrating the work done by Eschelon under the "consulting" agreement. Based on that review, the "consulting" work performed by Eschelon is no different than the work other CLECs do all the time in order to get products and services provisioned better to them.[5] In fact, the work that Eschelon did with Qwest, including all of the work described in the Petition, is almost identical to the work done by the CLECs that worked to implement line sharing for the first time in Minnesota. No company was paid for that work, nor would they have expected to be paid.

It is important to note that, even under the narrow standard proposed by Qwest in the Petition, the agreements to provide a 10% discount to Eschelon and the comparable discount to **[BEGIN TRADE SECRET]** **[END TRADE SECRET]** would have to be filed with state commissions because they directly address UNE pricing. It is undisputed, however, that Qwest did not file either agreement. Instead, it tried to hide the Eschelon agreement first by not putting it in writing, and later hiding behind the consulting fiction. It hid the agreement with **[BEGIN TRADE SECRET]** **[END TRADE SECRET]** simply by keeping it oral instead of putting it in writing.

Other documents uncovered by the Department provide further evidence that Qwest knew the agreements identified in the Department's complaint had to be filed with the MPUC under 47 U.S.C. §252 but chose not to do so.

[BEGIN TRADE SECRET]

[5] The Department's comments here are referring to the work that Qwest has claimed was the justification for the 10% discount – e.g. the work done on the DSL wholesale issues.

[END TRADE SECRET]

C. QWEST'S Behind-The-Scenes Involvement In CC Docket No. 01-117 Also Shows It Knew The Secret Agreements Had To Be Filed.

As this Commission is aware, on May 25, 2001, Mpower Communications Corp. ("Mpower") filed a Petition for Forbearance and Rulemaking requesting that the Commission establish a new flexible contract mechanism, which Mpower calls a "FLEX contract."[6] Although the filing identifies only Mpower as the petitioner, it was actually a joint effort between Qwest and Mpower, as evidenced by the joint *ex parte* meetings and correspondence these two companies shared with the FCC in advance of the filing.[7]

In the Mpower petition, Qwest and Mpower requested that for FLEX contracts – described generally as "business to business agreements," the Commission: (1) forbear from

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[6] In the Matter of Petition of Mpower Communications Corp. for Establishment of New Flexible Contract Mechanism Not Subject to "Pick and Choose", CC Docket No. 01-117.

[7] *See* the March 2, 2001 and March 29, 2001 *Ex Parte* letters to Magalie Roman Salas from Qwest in CC Docket Nos. 98-147 and 96-98. While Qwest and Mpower clearly notified the FCC (Footnote Continued on Next Page)

application or enforcement of section 252(i) "pick and choose" requirements; (2) forbear from application or enforcement of section 252(e) provisions regarding submission of FLEX contracts to state commissions for approval or enforcement; and (3) institute a rulemaking to establish a federal program for notification, opt-in, and enforcement of FLEX contracts.[8]

What should be of great concern to the Commission, however, is that Qwest failed to notify the Commission that Qwest had already entered into a series of what Qwest apparently considers to be "business to business flex contracts" – the Secret Agreements – when it came to the Commission with Mpower. It is evident from the fact that Qwest and Mpower are seeking forbearance from the rules that Qwest knew what its filing and pick and choose obligations were when it entered into the Secret Agreements, but obviously hoped to have the FCC put its stamp of approval *nunc pro tunc* on what Qwest clearly knew was improper at the time.

The present Petition is a continuation of Qwest's efforts to validate in hindsight conduct that it new violated the Act when Qwest committed it. Similarly, it is another effort to have a second bite at the apple on the issues raised in Mpower's petition. Qwest's active participation in seeking forbearance from the application of filing and pick and choose requirements of Section 252 to agreements like the ones at issue in the Department's complain clearly indicates its knowledge that those requirements do, in fact, apply to such agreements.

(Footnote Continued From Previous Page)
early on that this was a joint endeavor, both companies filed comments independently as if they were operating independently in the docket.

[8] *See* In the Mattter of Petition of Mpower Communications Corp. for Establishment of New Flexible Contract Mechanism Not Subject to "Pick and Choose", CC Docket No. 01-117, *Petition for Forbearance and Rulemaking*, at p. 3

D. Even Absent The Evidence Found By The Department, It Is Clear That QWEST Understood The Terms And Conditions In The Secret Agreements Constituted Terms And Conditions Of Interconnection And Access To UNES.

The simple truth is that Qwest cannot reasonably dispute that the majority of the provisions cited by the Department in its complaint are terms that Qwest knows must be filed in interconnection agreements because Qwest includes terms addressing the same topics both in interconnection agreements it files regularly and in its statement of generally available terms under 47 U.S.C. § 252(f).[9]

UNE pricing, for example, is included in every interconnection agreement. In fact, its inclusion is specifically mandated by 47 U.S.C. § 252(a)(1), which states that interconnection agreements "shall" include an itemized schedule of charges.

Reciprocal compensation is another interconnection issue addressed in every interconnection agreement filed by Qwest and in Section 7.3 of the SGAT it filed in Minnesota.

Likewise, each of the provisions in the Covad Agreement directly addresses the terms and conditions under which Qwest must provide UNE loops to Covad. There can be no legitimate dispute that these provisions are terms and conditions of interconnection that must be filed under the Act.

In fact, each of the provisions cited by the Department, including the dispute resolution provisions, has a direct corollary in Qwest interconnection agreements and its SGAT. Qwest's

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[9] The Department agrees that there is one term in Eschelon Agreement V – the $2 per month per line payment to Eschelon in lieu of providing records that show Qwest's access to UNE platform lines for intraLATA toll traffic – about which there can be a legitimate dispute. However, as discussed *infra* at Section V, the Department maintains that the resolution of those disputes should be left for the state commissions. The Department submits that this is a term and condition of interconnection because it substitutes the $2 payment for Qwest's obligation to provide Eschelon with accurate access records as part of its UNE platform product.

post-violation, self-serving claim that it had a good faith belief that these provisions did not need to be filed simply because they were in agreements that were labeled something other than "interconnection agreement" is disingenuous, at best.

III. QWEST DID NOT FILE THE SECRET AGREEMENTS BECAUSE THOSE AGREEMENTS SHOW THAT QWEST LEVERAGED ITS CONTROL OF THE TELECOMMUNICATIONS NETWORK TO MANIPULATE THE REGULATORY PROCESS, AND BECAUSE QWEST WANTED TO PREVENT OTHER CLECS FROM EXERCISING THEIR RIGHTS UNDER 47 U.S.C. § 252(I).

The Department's investigation uncovered at least two reasons why Qwest did not file the Secret Agreements with the MPUC.

Most disturbing is the evidence that Qwest entered into these agreements to manipulate pending regulatory proceedings, including state and FCC consideration of Qwest's Section 271 application. Ten of the 11 agreements cited by the Department were tied directly into efforts by Qwest's wholesale group to leverage Qwest's control of the network to get CLECs to either withdraw their opposition to the Qwest / U S WEST merger in then-pending proceedings or to not participate in any review of Qwest's Section 271 application.[10]

Qwest's conduct and documents uncovered by the Department also show that Qwest was trying to avoid its non-discrimination obligations by preventing other CLECs from being able to opt into these agreements under 47 U.S.C. § 252(i).

[10] The only agreement not so implicated was the USLink Agreement, which came about as the result of litigation between USLink, InfoTel and U S WEST.

A. QWEST Leveraged Its Control Of The Network To Eliminate Opposition To The QWEST / U S WEST Merger Through Four Of The Secret Agreements.

Four of the 11 agreements are directly tied to the Qwest and U S WEST's efforts to eliminate CLEC participation in the consideration of their merger.[11] That is, Qwest promised in four agreements to provide new terms and conditions of interconnection, access to UNEs and services to CLECs in exchange for those CLECs withdrawing their opposition to the Qwest / U S WEST merger in then-pending proceedings before state and federal regulatory bodies that were reviewing the merger. Those agreements are:

(1) The February 28, 2000 agreement between Qwest (at the time U S WEST) and Eschelon (at the time, Advanced Telecommunications, Inc.) that is identified as Eschelon Agreement I in the Department's complaint. In Eschelon Agreement I, Qwest agreed (a) to provide Eschelon with the best reciprocal compensation rates for terminating Internet traffic offered by Qwest anywhere in its 14-state territory; (b) provide Eschelon with a dedicated, on-site provisioning team that has access to Qwest internal systems to help Eschelon with UNE ordering and provisioning; (c) suspend termination liability assessments ("TLAs") for retail to resale conversions in Minnesota (while it continued to charge TLAs to other CLECs); and (d) to provide Eschelon with new alternative dispute resolution mechanisms not available to other CLECs to govern the interconnection relationship between the parties. In exchange for these agreements, Eschelon agreed to withdraw its

[11] A fifth agreement, identified as Eschelon Agreement II in the Department's complaint (Appendix A) sets out, in more specific detail, the terms and conditions for providing the dedicated, on-site provisioning team agreed to by Qwest as part of securing Eschelon's withdrawal from MPUC's consideration of the Qwest / U S WEST merger.

opposition to the Qwest / U S WEST merger before the MPUC. Qwest never filed this agreement with the MPUC. (Complaint, ¶¶ 30 – 57 and Exhibit 1.)

(2) The April 19, 2000 Service Level Agreement between Qwest (at the time, U S WEST) and Covad. Qwest agreed among other things (a) to meet specified quality standards for providing FOCs to Covad within 48 hours of receiving a properly completed order; (b) to change the FOC process for certain kinds of loops ordered by Covad; (c) to meet specified quality standards for provisioning UNE loops within standard intervals; (d) to meet specified quality standards for reducing Qwest service failures on new loops; (e) to perform specified tasks to make unbundled loops available for Covad to provide IDSL service; and (f) to meet specified quality standards and service intervals for conditioning UNE loops for Covad's use.[12] In exchange, Covad agreed to withdraw its opposition to the Qwest / U S WEST merger.[13] (Complaint, ¶¶ 150 – 195 and Exhibit 7.)

(3) The April 28, 2000 "Confidential Billing Settlement Agreement" between Qwest and McLeodUSA. This is the agreement referred to as McLeod Agreement I in the Department's complaint. This agreement resolved a number of billing disputes between the parties, resulting in a $29.7 million payment by Qwest to McLeodUSA. Qwest also agreed to treat all interim UNE rates as final, with no

[12] At the hearing on the Department's complaint, Qwest attempted to introduce evidence that many of the standards set out in Covad's agreement – the commitment, for example, to meet standard installation intervals 90% of the time – are now part of Qwest's standard practices. In April 2000, none of the commitments made by Qwest in the Covad agreement were part of any express agreement or even internal policy at Qwest. Moreover, there is a difference between internal practices that can be changed by Qwest and concrete and specific contractual obligations that cannot.

true-up required if and when the state commissions set final UNE rates. This changed the McLeodUSA interconnection agreement, which required a true up. In exchange for these agreements, and others, McLeodUSA agreed to withdraw its opposition to the Qwest / U S WEST merger. (Complaint, ¶¶ 209 - 218 and Exhibit 10.)

(4) The April 18, 2000 "Confidential Stipulation Between Small CLECs and U S WEST." In this agreement, referred to in the complaint as the "Small CLEC Agreement," Qwest agreed, among other things, to allow a coalition of small CLECs in Minnesota to have multi-state pick and choose rights when their interconnection agreements expired in March, 2002.[14] In exchange, the CLECs withdrew their opposition to the Qwest / U S WEST merger. (Complaint, ¶¶ 196 - 205 and Exhibit 8.) Significantly, Qwest and the Small CLECs entered into two versions of the Small CLEC Agreement on April 18. The one described in the complaint contained every provision and was marked confidential. The second copy, which Qwest and the Small CLECs filed with the MPUC, did not contain either the pick and choose provision or any indication that the pick and choose provision had been redacted.

In each case, Qwest leveraged its control of access to the telecommunications network to get CLECs to help it get what it wanted on the regulatory front – approval of the Qwest / U S

(Footnote Continued From Previous Page)
[13] The Covad Agreement was never filed with the MPUC but was subsequently disclosed to the Washington Utilities and Transportation Commission in response to a request for it.
[14] Although SBC had made the multi-state pick and choose option available in its territory as a condition of its merger with Ameritech, this provision has never been available from Qwest in Minnesota.

WEST merger. This is true even for provisions – like the $29.7 million payment to finally resolve multiple disputes with McLeodUSA – that do not appear to arise to the level of an interconnection agreement. Thus, Qwest leveraged (a) reciprocal compensation rates; (b) access to better ordering and provision; (c) the customer cost of retail to resale conversions; (d) quality of service agreements for provisioning UNEs; (e) the uncertainty of UNE rate true-ups;(e) multi-state pick-and-choose rights, and even (f) Qwest's willingness to resolve billing disputes, to get CLECs to adopt particular regulatory positions that favored Qwest.

At least one state commission – the Washington Utilities and Transportation Commission – became aware of some of these agreements and found this practice to be against the public interest.[15] Other state commissions, however, never had an opportunity to even consider this issue because Qwest did not file these agreements with those commissions. To the contrary, and at least in Minnesota, the Commission made it clear that it expected agreements related to terms and conditions of interconnection to be filed for their review and approval. Qwest did not file the four agreements identified above, thus misleading the Department and the Commission to believe that terms and conditions of interconnection were not involved in any of the merger settlement agreements.

B. QWEST Is Again Leveraging Its Control Of The Telecommunications Network Through Five Other Secret Agreements To Prevent State Commissions And The FCC From Obtaining Information Directly Relevant To QWEST'S Section 271 Application.

[15] *See* In Re Application of U S WEST, Inc. and QWEST COMMUNICATIONS INTERNATIONAL, INC. for An Order Disclaiming Jurisdiction, or in the Alternative, Approving the U S WEST, INC.--QWEST COMMUNICATIONS INTERNATIONAL, INC. Merger; *Eighth Supplemental Order Denying Petitions for Leave to Withdraw; Denying Confidential Status to Bench Request Response and Providing Notice,* Docket No. UT-991358

Five of the 11 agreements identified in the Department's complaint were the direct result of efforts by Qwest to prevent Eschelon and McLeodUSA – two of Qwest's largest wholesale customers – from participating in consideration of Qwest's application to provide in-region, interLATA long-distance services by the state commissions and the FCC.

Eschelon's agreement not to participate in the consideration of Qwest's section 271 applications is included in the document identified in the Department's complaint as Eschelon Agreement III. (Complaint Exhibit 3.) Eschelon Agreement III is one agreement in a four-agreement transaction that also included the agreement identified in the complaint as Eschelon Agreement IV, a "Confidential Purchase Agreement" attached as Appendix B, and the Eighth Amendment to Eschelon's interconnection agreement with Qwest.[16] All four of these agreements were negotiated, drafted and executed simultaneously, and they are inter-dependent.[17]

Through these linked agreements, Qwest agreed to give Eschelon the following in exchange for Eschelon agreeing not to participate in consideration of Qwest's Section 271 application before any state commission or the FCC:**

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[16] The agreement identified as Eschelon Agreement V in the complaint is an amendment to the terms of Eschelon Agreement IV, while the agreement identified as Eschelon Agreement VI is an "Implementation Plan" that the parties agreed to create in Eschelon Agreement III. (*See* Complaint Exhibits 5 and 6.)

[17] Qwest's understanding that the agreements in all of these documents were inextricably linked together is also evidenced by the express reference in the Eighth Amendment to the $150 million purchase commitment made by Eschleon in the agreement attached as Appendix B. That $150 million commitment is also expressly referenced in Eschelon Agreement IV, which makes the 10% discount discussed *supra* at Section II.B dependent on Eschelon meeting that commitment. **[BEGIN TRADE SECRET]**

[END TRADE SECRET]

(1) A 10% discount on all purchases made by Eschelon from Qwest between November 15, 2000 and December 31, 2005. (Complaint ¶¶ 92 – 109 and Exhibit 4, ¶ 3.)

(2) A $13 per month per line credit for every UNE platform line purchased by Eschelon from Qwest in lieu of Qwest providing accurate access information for Eschelon's use in billing IXCs for access charges. (Complaint ¶¶ 110 – 114 and Exhibit 4, ¶ 2.) This amount was later increased to $16 per line per month in Eschelon Agreement V. (Complaint ¶¶ 115 – 122 and Exhibit 5.)

(3) An agreement to develop an "implementation plan" intended to improve the way Qwest provides interconnection and UNE access to Eschelon. (Complaint Exhibit 3.) The implementation plan finally agreed to by Qwest is in the complaint described in complaint paragraphs 127 through 159 and attached to it as Exhibit 6.

(4) A concrete and specific legal obligation to provide Eschelon with access to Qwest's most senior executives, including its CEO, to address interconnection issues of concern to Eschelon. (Complaint ¶¶ 76 - 85 and Exhibit 3, Sections 2 and 3.)

(5) An unfiled amendment to the dispute resolution language in Eschelon's interconnection agreement with Qwest that waived jurisdictional issues and damage limitations for actions brought by Eschelon against Qwest that met certain pre-litigation dispute resolution criteria. (Complaint ¶¶ 87 – 91 and Exhibit 3, Section 3.)

(6) Access to a new UNE platform product, which Qwest calls UNE Star.[18] Some of the terms related to that product are contained in a publicly-filed document referred to as the Eighth Amendment to the Eschelon ICA. Others – the $13 per-line, per-month credit for example – are contained in one or more of the Secret Agreements.

Qwest entered into a similar arrangement with McLeodUSA in exchange for an oral agreement to stay out of the Section 271 proceedings. McLeodUSA confirmed this in its response to a discovery request from the Department that is attached as Appendix N. In that response, McLeodUSA indicates that its agreement to stay out of the Section 271 proceedings depends on Qwest complying with all of its agreements with McLeodUSA.

[BEGIN TRADE SECRET] [19]

[18] While the agreements indicate that UNE Star is a UNE platform product, the Department has found evidence suggesting that Qwest never treated UNE Star as anything other than a resale product at UNE platform pricing and with some of the benefits – i.e. the ability of the CLEC to charge for access – that come along with UNE platform products.

[19] The Department confirmed the existence of this agreement for the first time on May 20, 2002, which is why the agreement is not included in its February 14, 2002 complaint. On May 24, 2002, the Department moved the court to re-open this matter so that the Department can amend its complaint to add this agreement and introduce the new evidence of its existence in that proceeding. That motion is pending. However, if the amendment is not allowed, the Department will likely file a new complaint related to this agreement.

[END TRADE SECRET]

These agreements show how Qwest's wholesale division used the interconnection process and Qwest's control of the network to help Qwest's retail division meet its goals in the §271 proceedings.

They also raise an important question: is it in the public interest for Qwest to make access and pricing for interconnection and UNEs contingent on a CLEC's agreement to forego involvement in important regulatory proceedings that could directly impact that CLEC, not to mention the broader public interest? These are precisely the kinds of questions that state commissions are statutorily mandated to decide under 47 U.S.C. §252(e). Because Qwest did not file these agreements, however, the MPUC may never have the opportunity to meet its mandate.

As a result, 14 states, including Minnesota, have been reviewing Qwest's Section 271 application without the participation of two of Qwest's largest wholesale customers in most of their workshops or adjudicative proceedings. The harm this has caused the process is clear at least to this extent: the Department's investigation has uncovered information that Qwest has not provided accurate billing or access information for the UNE platform products ordered by Eschelon from Qwest at any time from 2000 through the present. Because Eschelon did not provide this information as part of the ROC OSS test or the various state workshops, however, this information was never included as part of that test. Moreover, to the extent that Eschelon or McLeod did provide information to the ROC, multistate coalitions, or state commissions, these agreements cloud any conclusions based in whole or in part on that information. The extent of the damage that these agreements have caused with respect to 271 proceedings across Qwest's territory is still unknown, and in Minnesota is still under investigation.

C. Other Evidence Shows That The Agreements Included In The Department's Complaint Were Part Of A Broader Effort By QWEST To Manipulate Regulatory Proceedings.

The Department's investigation also uncovered a trail of documents that puts context around the Secret Agreements and provides further evidence that Qwest entered into at least some of them with the intent to covertly affect its Section 271 applications. Three documents, for example, show that Qwest tried to convince Eschelon to turn over to Qwest every copy of an audit that concluded that Qwest was not providing accurate switched access records for Eschelon's UNE-Star lines. In fact, these documents show that **[BEGIN TRADE SECRET]**

[END TRADE SECRET] and that Qwest offered to pay Eschelon for Eschelon to become an advocate for Qwest in various Commission proceedings whenever Qwest requested Eschelon to do so. Reporting of access minutes related to UNE platform products is, of course, an issue in evaluating Qwest's readiness for Section 271 approval. These documents are attached as Appendices J and K (which contains two of the documents).

These and other documents uncovered by the Department show that several of the agreements entered into by Qwest were part of a broader effort to prevent state commissions and the FCC from obtaining and reviewing evidence relevant to Qwest's Section 271 application. It is for this reason – not because of any legitimate belief by Qwest that the agreements need not be filed – that Qwest intentionally did not file the Secret Agreements. Set forth below is a brief description of some of the documents uncovered by the Department and the important information they contain:

[BEGIN TRADE SECRET]

[20] **[END TRADE SECRET]**

Then, on October 30, 2001 Ms. McKenney signed and sent to Eschelon two agreement offers, both of which are part of Appendix K. In the first, a "Confidential Purchase Agreement," Ms. McKenney and Qwest offered to pay Eschelon $1.8 million for "carrier-related services." Among the services Qwest sought in the agreement was the following:

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[20] **[BEGIN TRADE SECRET]**

[END TRADE SECRET]

> Eschelon shall, when requested by Qwest file supporting testimony/pleadings/comments and testify whenever requested by Qwest in a manner suitable to Qwest (substantively). In addition, upon request by Qwest, Eschelon will withdraw or dismiss existing proceedings.

The second offer sent by Ms. McKenney to Eschelon was a "Confidential Billing Settlement Agreement." In this agreement, Qwest offered to pay Eschelon $1.344 million in settlement for switched access disputes. Paragraph 7 of the offer required the following:

> Eschelon agrees to deliver to Qwest all reports, work papers, or other documents related to the audit process described in that letter.[21] Eschelon will certify to Qwest within 10 days of execution of this Agreement that it has delivered to Qwest all reports, work papers, or other documents (originals and copies) as required by this Agreement. If Eschelon violates this provision of this Agreement it shall be a material breach of the Agreement. Regardless, the Parties and their agents or consultants shall treat such information as confidential and subject to Rule of Evidence 408.

As this collection of documents and agreements shows, one of Qwest's primary motives in entering into and concealing the Secret Agreements was to manipulate regulatory proceedings in Qwest's favor. These documents demonstrate a desire and intent on the part of Qwest to confiscate and hide information adverse to Qwest by offering to CLECs the one thing they cannot resist in today's difficult capital markets: cold, hard cash.

D. QWEST Also Kept The Secret Agreements Secret Because It Did Not Want To Make Their Provisions Available To Other CLECS Under 47 U.S.C. § 252(i).

The other, more obvious reason that Qwest did not file its agreements with the CLECs was because Qwest did not want other, non-party CLECs to be able to obtain the same terms under 47 U.S.C. §252(i). This reason is evident from the documents attached as Appendices D, E and F, as discussed *supra* at Section II.B. Qwest's intent to keep other CLECs from opting

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[21] The letter referred to here is the July 3, 2001 letter agreement attached as Exhibit 5 to the Department's complaint, and the audit process referred to in that letter resulted in the access audit that Qwest originally asked Eschelon to destroy.

into these agreements can also be seen in its termination of 8 different agreements with Eschelon, including 4 of the agreements identified in the Department's complaint, only *after* the Department filed its complaint bringing these agreements to the attention of the MPUC. *See* Appendix M.

IV. THE ACT ADDRESSES WHAT AGREEMENTS MUST BE FILED WITH STATE COMMISSIONS.

To answer Qwest's question relating to the scope and standards that govern interconnection agreements, one need only look at the Act and this Commission's consistent interpretation of it. *See* 47 U.S.C. §§ 251, 252, 271 and *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, ¶ 167 (FCC Aug. 8, 1996)(the "*Local Competition Order")* These three statutory provisions, and the Commission's implementation of them, directly address the standards that define what an ICA is and when it must be filed.

A. 47 U.S.C. § 252 Requires QWEST To File All Interconnection Agreements With The Commission To Prevent Discrimination Against Non-Party CLECS.

Section 252 requires ILECs to file all interconnection agreements with the relevant state commissions for approval under § 252(e).[22] Terms and conditions from approved interconnection agreements are then available for other CLECs to opt into under § 252(i).[23] A primary goal of § 252(i) is to prevent Qwest from discriminating against non-party CLECs.[24]

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[22] Section 252(a)(1) permits ILECs to enter into negotiated agreements for interconnection, services or network elements and provides that "The agreement … shall be submitted to the State commission under subsection (e) of this section." Section 252(e)(1) requires that "any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission."

[23] 47 U.S.C. §252(i) says "A local exchange carrier make available any interconnection, service or network element provided under an agreement approved under [§252] to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement."

[24] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, *First Report and Order*, 11 FCC Rcd 15499 at ¶ 167 (1996).

In the *Local Competition Order*, the Commission made it clear that there are no exceptions to § 252's filing requirements. All interconnection agreements must be filed. The Commission said:

> As a matter of policy, moreover, we believe that requiring filing of all interconnection agreements best promotes Congress's stated goals of opening up local markets to competition, and permitting interconnection on just, reasonable, and nondiscriminatory terms. State commissions should have the opportunity to review *all* agreements, including those that were negotiated before the new law was enacted, to ensure that such agreements do not discriminate against third parties, and are not contrary to the public interest. In particular, preexisting agreements may include provisions that violate or are inconsistent with the pro-competitive goals of the 1996 Act, and states may elect to reject such agreements under section 252(e)(2)(A). Requiring all contracts to be filed also limits an incumbent LEC's ability to discriminate among carriers, for at least two reasons. First, requiring public filing of agreements enables carriers to have information about rates, terms, and conditions that an incumbent LEC makes available to others. Second, any interconnection, service or network element provided under an agreement approved by the state commission under section 252 must be made available to any other requesting telecommunications carrier upon the same terms and conditions, in accordance with section 252(i). In addition, we believe that having the opportunity to review existing agreements may provide state commissions and potential competitors with a starting point for determining what is "technically feasible" for interconnection.[25]

The Commission's interpretation of § 252 to require the filing of *all* interconnection agreement is consistent with the clear language of § 252(e)(1), which says "Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission." It is also wholly in line with the legislative history of the Act. In the *Conference Committee Report* on the Act, Congress made it clear that §251(c) imposes an obligation on ILECs to "negotiate in good faith, subject to the provisions of section 252, binding agreements to provide all of the obligations imposed in new sections 252(b) and 251(c)."[26]

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[25] *Local Competition Order* at ¶ 167, emphasis in original.
[26] *Telecommunications Act of 1996, Conference Report, H. Rep. 104-458 at 121 (Jan. 31, 1996).*

Explaining § 252(e) of the Act, the *Conference Committee Report* states in relevant part "Agreements arrived at through voluntary negotiation or compulsory arbitration *must* be approved by the State commission under new section 252(e)."[27] (Emphasis added). The report goes on to explain "New section 252(i) requires a local exchange carrier to make available on the same terms and conditions to any telecommunications carrier that requests it any interconnection, service, or network element that the local exchange carrier provides to any other party under an approved agreement or statement."[28]

B. The Act Defines What Is Contained In An Interconnection Agreement.

Although the term "interconnection agreement" is not specifically defined by statute, the Act makes it clear what an interconnection agreement is by specifying both the ILECs' specific interconnection obligations and the terms that ILECs must include in interconnection agreements in order to receive authority to provide interLATA long distance service.

The ILECs' general duties and specific interconnection obligations are set out in 47 U.S.C. §§ 251(b) and (c). Section 251(b) imposes duties on all local exchange carriers to provide resale, number portability, dialing parity, access to rights of way and reciprocal compensation. Section 251(c) imposes on ILECs specific obligations to provide interconnection, access to network elements, resale, notice of changes and collocation generally on non-discriminatory terms and conditions.

Section 251(c)(1) further imposes on the ILEC a "duty to negotiate in good faith in accordance with section 252 the particular terms and conditions of agreements to fulfill the duties described in paragraph (1) through (5) of subsection (b) and this subsection." Section

[27] Id., at 126.
[28] Id.

252(a)(1) likewise refers back to Section 251, recognizing that ILECs may enter into voluntary negotiations for binding agreements "upon receiving a request for interconnection, services, or network elements pursuant to section 251."

At a minimum, therefore, the Act mandates that interconnection agreements include the terms and conditions of agreements to fulfill the ILECs duties under Sections 251(b) and (c). Section 252(a)(1) also requires that "the agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement."[29]

Section 271 provides further guidance on the scope of terms and conditions that make up an interconnection agreement by requiring ILECs to demonstrate that specific issues be addressed in interconnection agreements in order for the ILEC to obtain interLATA long distance authority. Thus, 47 U.S.C. §271(c)(2) requires Qwest and other ILECs to show that they are providing access and interconnection pursuant to an interconnection agreement and that "*such access or interconnection meets the requirements of subparagraph (B) of this paragraph.*" (Emphasis added).[30] Subparagraph (B) of §271(c)(2) sets out in detail a competitive checklist of items that, under § 271(c)(2)(A) *must* be included in interconnection agreements for an ILEC to obtain interLATA long distance authority. If terms relating to the checklist items must be included in interconnection agreements, then any agreement containing such terms must be an interconnection agreement.[31]

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[29] Contrary to Qwest's argument, however, this is simply a statement of one element of what an interconnection agreement must contain, not an exhaustive list of what an interconnection agreement is.

[30] For § 271 purposes an ILEC may also show compliance with § 271(c)(2) by generally offering such access or interconnection pursuant to a statement of generally available terms and conditions, commonly referred to as an SGAT.

[31] Terms from the Secret Agreements fall under one or more of Checklist Items (i), (ii), (iv), (xiii) and (xiv).

In its decision granting SBC Communications Inc.'s application to provide in region, interLATA services in Texas, the Commission explained further the requirements of § 271(c)(1)(A), stating in relevant part that "a BOC must demonstrate it has a concrete and specific legal obligation to furnish the [checklist] item upon request pursuant to state-approved interconnection agreements that set forth prices and other terms and conditions for each checklist item."[32]

These standards need no further clarification by the Commission. Interconnection agreements are those agreements that contain terms and conditions that fulfill the ILECs' duties set out in Sections 251(b) and (c) and/or their obligations under Section 271(c)(2)(B). ILECs and CLECs have been operating under these standards since 1996 with no problems whatsoever until Qwest began entering into secret agreements intended to further its regulatory goals, and there is no indication that complying with these standards has ever been an issue for any ILEC other than Qwest.

C. The Narrow Standard Proposed By QWEST Would Thwart The Intent Of Section 252(i).

The Commission should not accept the narrow standard proposed by Qwest to replace those promulgated by Congress under the Act because Qwest's proposed standard would thwart the pro-competitive intent of Section 252(i).

As the Commission recognized in the *Local Competition Order*, requiring all interconnection agreements to be filed helps to prevent discrimination by ILECs because of the

[32] *See* Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services Inc., d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas, *Memorandum Opinion and Order*, CC Docket No. 00-65, FCC 00-238, ¶ 52 (adopted June 30, 2000) (the "SBC Texas Order")

opt-in provisions of Section 252(i). The Commission's discussion of the filing requirement implicitly recognized that for Section 252(i) to be effective, the provisions governing interconnection between an ILEC and a CLEC must actually be on file and approved by the relevant state commission.

In Section III.A of its Petition, Qwest proposes a new standard that would require ILECs to include only the bare bones of interconnection in interconnection agreements. Qwest proposes that interconnection agreements need only contain (1) a description of the service or network element being obtained; (2) a list of the various options available for the network element; and (3) a list of prices for the network elements.[33]

In addition to being in direct contrast to the expansive view of interconnection set out in the Act, Qwest's narrow view would eliminate the pro-competitive effects of Section 252(i). Under Qwest's view, an ICA would need only say that "Qwest agrees to provide CLEC with access to unbundled loops, including 1FRs, 1FBs, DS1s," etc. "at the rates set forth on Schedule A to this agreement." This view would exclude from ICAs important terms such as those setting the provisioning intervals for providing UNEs and terms describing how a CLEC would order UNEs. It would exclude terms describing reciprocal compensation arrangements and other aspects of interconnection, including collocation. It would also exclude any reference to the terms and conditions by which a CLEC can obtain access to poles, ducts, conduits and rights-of-way controlled by Qwest.

Thus, under Qwest's view, Qwest could enter into bare-bones agreements with CLECs to be filed with the state commissions, leaving the interesting details in "confidential" secret agreements that the commissions never have an opportunity to review. Under this view, Qwest could, for example, agree in a non-ICA to provision CLEC A's UNE loops in 24 hours, while its agreements with other CLECs requires it to provision the same loops only in five days or more. Moreover, because the non-ICA terms would never have to be filed under Qwest's proposed standard, there would be no way for the state commissions to discover that Qwest was discriminating against every CLEC other than CLEC A.

This is exactly the kind of discrimination that Section 251 prohibits and the combination of Sections 252(a)(1), (e) and (i) were designed to prevent. By requiring all of interconnection agreements, as broadly defined by the Act, to be filed under Sections 252(a)(1) and (e), the Commission insures that ILECs cannot contractually discriminate among similarly situated CLECs. Adopting the narrow standard proposed by Qwest would eliminate the important ability of the state commissions to monitor and enforce Qwest's non-discrimination obligations. It furthermore would prevent CLECs from obtaining the important information that they need to determine whether or not to opt into a provision under Section 252(i).

V. THE QUESTION OF WHETHER ANY SPECIFIC AGREEMENT CONSTITUTES AN INTERCONNECTION AGREEMENT IS ONE FOR THE RELEVANT STATE COMMISSION TO DECIDE.

The question of whether any specific agreement constitutes an interconnection agreement is one that must be decided by the relevant state commissions, not the FCC. The Act mandates this conclusion, and any other result would be totally unworkable.

Section 252(e) grants the authority to review both voluntarily negotiated and arbitrated interconnection agreements to state commissions. The FCC only has jurisdiction over such agreements if the state commission fails to act on filed agreements within mandated time

(Footnote Continued From Previous Page)
[33] Qwest does concede that OSS is a network element.

periods.[34] In fact, Section 252(e)(3) grants state commissions broad authority to require other aspects of state law to be reflected in interconnection agreements, including intrastate service quality standards. As a result, there is no way that the FCC can, as Qwest asks it to, identify every provision that is subject to filing with the state commissions under Section 252.

Moreover, as a matter of policy, the Commission should leave the review of specific agreements and specific provisions to the states. There is no practical way that the Commission can review the myriad of agreements entered into by ILECs and CLECs to determine which, if any, should be filed with state commissions. The state commissions, in contrast, already have established procedures for reviewing such agreements that have been in place and working well for nearly six years now.

The Commission completed its role in this process when it determined, in the *Local Competition Order*, that all interconnection agreements must be filed with the state commissions. As discussed *supra* at Section IV, the Act is clear on what constitutes an interconnection agreement, and the Commission has amplified those standards, when necessary, as it has considered various Section 271 applications that depend on interconnection agreements to establish compliance with Section 271(c). It is a matter for the states, now, to determine whether any individual agreement between an ILEC and a CLEC constitutes an interconnection agreement.

[34] 47 U.S.C. §252(e)(5).

VI. A ROSE BY ANY OTHER NAME: QWEST'S ARGUMENT THAT SETTLEMENT AGREEMENTS AND OTHER "BUSINESS TO BUSINESS" AGREEMENTS CANNOT BE INTERCONNECTION AGREEMENTS IS ONE OF FORM OVER SUBSTANCE.

Throughout its petition, Qwest suggests that "settlement agreements," "business to business agreements" and certain other types of agreements should not be subject to Section 252's filing requirements, presumably because of what the agreements are called.

Qwest's argument is one of form over substance. The relevant question is whether the content of any agreement meets the requirements of the Act to constitute an interconnection agreement. Whether that agreement was entered into as the result of a litigation settlement, or is called a "business to business" agreement by the parties is wholly irrelevant.

The absurdity of Qwest's position can be demonstrated by a simple example. Qwest is currently engaged in a Minnesota proceeding to determine the TELRIC of Qwest UNEs. If Qwest were to reach a settlement agreement with a CLEC involved in those proceedings to give that CLEC permanent, specified prices for the UNEs at issue, there is no doubt that the agreement for those prices would constitute interconnection agreement terms that would have to be filed with the MPUC. Under Qwest's narrow view, however, those pricing terms would be excluded from Section 252's purview because they were part of a settlement agreement.

The Department has no concern with Qwest not filing settlements of legitimate billing disputes, for example, that do not rise to the level of an interconnection agreement. Many of the agreements reviewed in the Department's investigation fall into this category and were not challenged.

The Commission, however, should not be swayed by Qwest's argument that the name defines the agreement. The substance of the agreement determines whether it is an interconnection agreement, and state commissions are more than capable of determining whether the substance of any individual agreement rises to that level.

VII. THE SKY IS NOT FALLING: QWEST'S APOCALYPTIC VISION OF THE WORLD WITHOUT COMMISSION INTERVENTION ON THIS ISSUE SIMPLY HAS NO FOUNDATION.

According to Qwest's Petition, many horrible things will happen if the Commission does not grant its petition for declaratory relief. Contrary to Qwest's Chicken Little-like warnings, however, ILECs, CLECs and state commissions have been dealing with the issues raised in Qwest's petition for six years now without significant conflict regarding those issues. As described below, none of the various dire predictions made by Qwest will actually come to pass if the Commission simply stays the course, declines to change the interconnection agreement standards set by Congress, and allows state commissions to perform their roles under Section 252.

A. CLECs And ILECs Have Worked Together, And Will Continue To Work Together, Pending ICA Approval.

Qwest's claims throughout its Petition about the alleged chilling effect of the 90-day filing and approval requirement of the Act on ILEC-CLEC business relations is another example of Qwest hyperbole run amok. The 90-day window in Section 252(e) is an outside window, and Qwest offers no evidence to suggest that the time it actually takes state commissions to review interconnection agreements on average even approaches this limit. Moreover, ILECS and CLECs typically either enter into interim agreements before ICA approval or use that time to address foundational issues such as getting collocation applications processed. As competent businesses, and assuming both are working in good faith, they find ways to make sure the work that needs to get done gets done.

In addition, Qwest's arguments about expediency really run against its position in the Petition. The most rapid way for a CLEC to obtain an interconnection agreement on any specific topic is, of course, to opt into an existing agreement under Section 252(i). The opt-in process can avoid, or at least minimize, the time and economic costs associated with each individual CLEC having to renegotiate its own terms and conditions for interconnection when those that already exist will do. Under Qwest's proposed regime, however, CLECs would have far less ability to cut through the negotiation process and simply opt-into readily available interconnection terms, and far less information about the agreements that Qwest has with other CLECs that might be useful to them.

B. State commission findings that an agreement should have been filed but was not will not render the agreement void.

Contrary to Qwest's arguments, a declaratory ruling is not needed to protect the settled contractual expectations of CLECs as well as ILECs. While Qwest's failure to file the Secret Agreements violated Section 252 and Section 251's prohibitions on discrimination, there is nothing in the Act or subsequent case law holding that unfilled agreements are, as Qwest suggests, not valid contracts. Further, nothing in the plain language of Section 252(e) precludes preparation for and preliminary implementation of an agreement after filing and while awaiting final approval. [35]

[35] The cases cited by Qwest in support of its argument merely suggest that seeking damages during the time it will take state commissions to review and approve the agreements Qwest has already entered into could be problematic. See, e.g., *Global NAPS, Inc. v. Verizon Communications*, File No. EB-01-MD-010, FCC 02-59, ¶ 23 (released Feb. 28, 2002) (dismissing as unripe a claim for enforcement of an interconnection agreement that had not yet been filed with and approved by the state commission); *GTE Northwest Inc. v. Hamilton*, 971 F. Supp. 1350, 1354 (D.Ore. 1997). However, one could fairly assume that such an action would not be necessary so quickly on a contract voluntarily entered into and submitted to the state commissions in a timely fashion.

Further, Qwest's reliance upon *Goldwasser v. Ameritech Corp*., 222 F.3d 390, 402 (7th Cir. 2000) and *Stein v. Pacific Bell Tel. Co*., 173 F. Supp. 2d 975, 987 (N.D. Cal. 2001), for its belief that the filed rate doctrine applies to interconnection agreements is misplaced. In both of these cases, actions for damages were brought by third parties, not by a CLEC under its interconnection agreement. In fact, the very nature of the interconnection agreement process evidences Congressional intent to exempt ICAs from a portion of the filed rate doctrine by allowing individual negotiation of prices and terms. The Act, however, still holds on to the non-discrimination aspects of the doctrine.

Finally, Qwest's argument really boils down to the proposition that it should be able to benefit from its own misconduct by escaping from these contracts now that it has secured the primary benefit it bargained for – regulatory cooperation. If the Commission accepts the argument, then Qwest will have a further cudgel to hold over the heads of CLECs. If, on the other hand, Qwest had properly followed the Act and submitted the ICAs for approval, there would be no need to entertain the outlandish scenarios Qwest depicts.[36]

C. There Is No Indication That There Will Be Inconsistent Decisions Among States, Or That There Is Anything Wrong With That Even If It Happens.

Finally, Qwest's claim that different state commissions' interpretations will result in different standards is yet another scare tactic. In the first place, no state has yet ruled on the specific agreements at issue in Minnesota, so any suggestion that different states will rule differently is simply premature speculation. Moreover, the Act itself recognizes that there will

[36] The state commission's power to approve an agreement "necessarily includes the power to enforce the interconnection agreement." *Southwestern Bell Tel. Co. v. Connect Communications Corp*., 225 F.3d 942, 946 (8th Cir. 2000) *citing Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 804 (8th Cir.1997), *aff'd in part, rev'd in part on other grounds sub nom. AT&T Corp., v. Iowa Utils. Bd*.,
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be flexibility in interconnection terms among the states, as evidenced by the preservation of the states' authority to enforce their own laws when it comes to interconnection agreements under Section 252(e)(3).

In addition, there is nothing wrong with different states reaching different conclusions about specific agreements if that is, in fact, what happens. Qwest and its predecessors have been active participants in the state regulatory processes throughout its territory ever since the breakup of AT&T (and, as AT&T, before). Qwest is well accustomed to dealing with regulatory issues that differ from state to state, and is certainly willing to take advantage of those differences when they work in Qwest's favor.

Congress has specifically acknowledged that state agencies have "an important role to play in the field of interconnection agreements" because Congress appreciated "the technical expertise of the state agenc[ies] for regulating the intrastate telecommunications industry."[37] This Commission has effectuated Congress' intent by consistently underscoring the importance of the states in developing flexible and varied approaches in the telecommunications industry. For example, in considering rules on 'slamming' this Commission recognized the wisdom of not having a " 'one-size fits all approach' as recommended by the carriers, [because it] would not take into consideration the specific experiences and concerns of individual states in the slamming area.[38]

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119 S. Ct 721 (1999). Owing to Qwest's premature petition, the state commission has not yet had an opportunity to evaluate the validity or enforceability of these ICAs.

[37] *Wis. Bell, Inc. v. Pub. Serv. Comm'n,* 27 F. Supp. 2d 1149, 1151 (W.D. Wis.); *Ind. Bell Tel. Co. v. Smithville Tel. Co.,* 31 F. Supp. 2d 628, 643 (S.D. Ind. 1998); and *Ill. Bell. Tel. Co.,* 179 F.3d at 574.

[38] *See* Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996, 14 F.C.C.R. 1508, 1562 (1998) (Second Report and Notice of
(Footnote Continued on Next Page)

As discussed throughout these comments, the high-level rules for what constitutes an interconnection agreement and the filing requirements for interconnection agreements have already been clearly stated by the Act and this Commission. Determinations as to whether or not specific agreements meet these standards should be left to the individual states that already review interconnection agreements on a regular basis.

VIII. CONCLUSION.

The Department urges the Commission to see the Qwest petition for what it is: an attempt to legitimize conduct Qwest knew would violate the Act while attempting an end-run around the ongoing proceedings in Minnesota and other states. The standards governing the terms and conditions that make up interconnection agreements are clear, as is the Commission's finding that all interconnection agreements must be filed with the relevant state commissions.

What really happened here is that Qwest got caught with its hand in the cookie jar. Qwest engaged in a practice of trading discriminatory terms and conditions of interconnection in exchange for agreements by certain CLECs not to participate in consideration of Qwest's Section 271 application and / or the Qwest / U S WEST merger. The most egregious of these agreements provided two CLECs – but no others – with substantial price reductions on UNEs, collocation, tariffed services and every other purchase made by the CLECs from Qwest. Qwest then concealed these agreements so that the MPUC never had an opportunity to decide whether such agreements are in the public interest, and other CLECs never had an opportunity to opt into the terms that interested them under Section 252(i).

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Proposed Rulemaking). *See further, United States Telecom Association v. FCC,* No. 00-1012, Decided May 24, 2002.

The FCC completed its role in this process long ago. It is now up to the states to analyze agreements entered into by Qwest to determine which, if any, constitute interconnection agreements that should be (and should have been) filed by Qwest, approved by the state commission, and made available to other CLECs for pick and choose. Accordingly, the Department respectfully requests that the Commission deny Qwest's Petition.

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